

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant, v. Robert Cleek, d.b.a. Robert Cleek Concrete Company, Respondent, 8 U.S.C. § 1324a Proceeding; Case No. 89100623.

DECISION AND ORDER AFFIRMING DEFAULT DECISION

Procedural History

On April 30, 1990, I entered a Judgment By Default against Respondent based on Respondent's failure to file a timely Answer to the Complaint. In the Judgment By Default, I outlined the procedural history of the case up to that date. The Judgment By Default ordered the Respondent to pay a civil monetary penalty of \$4,800 and further provided that Respondent could obtain review of the final order by submitting a written request for review with the Chief Administrative Hearing Officer within (five) 5 days of the final order.

In letter dated May 7, 1990, but received by the Chief Administrative Hearing Officer (CAHO) on May 24, 1990, pro se Respondent requested ``a review of my case.''

On May 30, 1990, I entered an Order Denying Respondent's Request To Reconsider Default Judgment. In this Order, I inadvertently viewed Respondent's letter of May 7, 1990, as a ``Motion to Set Aside'' the Judgment By Default. Additionally, in this Order, I gave Respondent the opportunity to submit a written statement explaining why he failed to obtain and respond to the Order To Show Cause Why Default Judgment Should Not Issue of March 12, 1990.

Also on May 30, 1990, the CAHO entered a Denial Of Respondent's Request For Administrative Review. The CAHO viewed Respondent's letter of May 7, 1990, as a request for administrative review of Judgment By Default. The CAHO denied Respondent's request for review because it could not be considered timely.

On June 8, 1990, Respondent filed a timely response to my Order Denying Respondent's Request To Reconsider Default Judgment.

Respondent did not furnish Complainant with copies of either his letter dated May 7, 1990, which requested ``a review of his case,' ' or

his letter dated June 5, 1990, which responded to the Order Denying Respondent's Request for Reconsideration of Default Judgment. Therefore, on June 13, 1990, I ordered that Complainant had until on or before June 25, 1990, to file its response to Respondent's letter of June 5, 1990.

On June 22, 1990, Complainant filed the Government Opposition To Motion To Set Aside Judgment Of Default. Complainant argues (1) that his court lacked jurisdiction to consider the Respondent's request for review as a ``Motion to Set Aside;'' and (2) even if this court did not lack jurisdiction, there is no basis to set aside the Judgment By Default.

### Legal Analysis

For the following reasons, I agree with Complainant's argument that I do have jurisdiction to set aside the default judgment heretofore entered by me on April 30, 1990.

As stated above, on May 30, 1990, I inadvertently construed Respondent's May 7th letter, as a motion to set aside the default judgment. As a result of that error, I re-opened this case after OCAHO ruled that Respondent's letter was not timely and affirmed the default judgement.<sup>1</sup>

Complainant has correctly argued that I do not have jurisdiction to consider Respondent's letter as a Motion to Set aside the default judgment because (1) the Respondent's May 7th letter was not directed to me but to OCAHO and, therefore, was clearly an appeal of my prior Order granting a default judgment; and (2) even if the letter was directed to me and construed as a motion to set aside the default judgment, it was not timely.<sup>2</sup>

It is my view that if Respondent wished to set aside my order granting a default judgment, Respondent should have made that request within five (5) days after my decision was made and prior to seeking an appeal with OCAHO. In view of the fact that I do not have jurisdiction to consider Respondent's letter of May 7th as a Motion to Set Aside the default judgment and OCAHO's decision to deny Respondent's request for administrative review, the default

---

<sup>1</sup>It is interesting to note that judges like other public official do make errors. It is also interesting to note that numerous writers, philosophers and poets have stated in various ways that Errare humanum est (to err is human). See, Plutarch's Morals. Of Man's Progress in Virtue (``For to err in opinion, though it be not the part of wise men, is at least human.''); Alexander Pope's An essay on Criticism, Part II, 1.325 (``To err is human, to forgive divine''); and James Shirley's The Lady of Pleasure (1635) (``I presume you're mortal, and may err.'').

<sup>2</sup> Although our regulations do not specifically provide for motions to set aside a default judgment, it's my view that such authority is implicit in 28 C.F.R. § 68.1 and Fed. R. Civ. Proc. 55(c) and 60(b).

judgment entered on April 30, 1990, has been affirmed and is the final order of the Attorney General.<sup>3</sup>

**SO ORDERED:**

This 20th day of July, 1990, at San Diego, California.

ROBERT B. SCHNEIDER  
Administrative Law Judge

---

<sup>3</sup> Since Respondent is acting pro se, I should point out that, even if I had jurisdiction to decide the motion to set aside the default, I did not find Respondent's explanation as to why he did not answer the ``Show Cause Order'' sufficient to set aside the default judgment pursuant to Rule 60(b) of the Fed. Rules of Civ. Procedures.